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THE INCONTESTABLE LIFE INSURANCE POLICY—MAY IT EVER BE CONTESTED?

I. COMMERCIAL ORIGIN AND HISTORY.

Out of the development of life insurance into a commercial science, and the unremitting efforts of such companies through varied forms of policies to stimulate and retain the public interest, grew a form of policy incontestable in terms, and directed to relieve a then prevalent impression that one buying life insurance by incident had purchased a law suit for one, to whom, after his death, the insured's interest may have been bequeathed.

Without familiarizing himself with its numerous technicalities, indeed possessing slight means of understanding their significance when explained, the purchaser of life insurance has always occupied an anomalous position in the domain of contract; not infrequently finding after paying for long years large sums of money in premiums, the only purpose of his sacrifices being to have it judicially determined after his death, when his voice could no longer be heard, that he had made a statement the effect of which was to defeat a recovery on his policy.

The effect of such cases, no matter how honestly defended by the insurance company, has been to create upon the public mind an impression that life insurance was quite a one-sided contract, designed very largely for the profit of the company. Such beliefs necessarily interfered with the successful conduct of their business, and gave rise to the demand for a policy ostensibly designed for the removal of similar objections. Out of these conditions developed the now current forms, and with them the *incontestable clause*.

In general, clauses of this character either make the policy incontestable *from date* or after a certain period, as *one year from date*. Considering the latter class first it may be briefly shown that clauses setting a specified time after which the policy is deemed to be incontestable, have been uniformly upheld, and the insurer precluded from interposing any defense whatsoever.

II. POLICIES INCONTESTABLE AFTER A SPECIFIED TIME.

As the views hereinafter advanced only have to do with the defense of fraud, authorities bearing on this phase of the subject are alone referred to.

Wright *v.* Mutual, etc., Association, 118 N. Y. 237, 16 Am. St. Rep. 749, is usually regarded as the leading case in that line of authorities involving policies incontestable after a given period. Here the policy was incontestable after two years from date. The Court, in part, says:

> "It (the incontestable clause) is not a stipulation absolute to waive all defenses and to condone fraud. On the contrary, it recognized fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of and serves a similar purpose as statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it, and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation thereon than that fixed by law, and such an agreement is in accord with the policy of statutes of that character. . . . . While fraud is obnoxious and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement, to the effect that if cause be not found and charged within a reasonable or specified time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid. Hence I fail to perceive any error in the disposition made of this question in the court below."

In Massachusetts Benefit Life Association *v.* Robinson, 104 Georgia 256, 42 L. R. A. 261, after exhaustively discussing the subject, the court says:

> "As the law may prescribe such a limitation in which actions shall be brought by the party to be affected, it is also within the power of the contracting parties to agree among themselves upon a period of time which would amount to a statute of limitations, either greater or less than the period fixed by the law."

In this case the policy was made incontestable after three years from its date, and although fraud in the procurement was shown, recovery on the policy was upheld.

In Clement *v.* N. Y. Life Insurance Co., 101 Tenn. 22, 42 L. R. A. 247, it was stated:

> "It has been held that an agreement limiting the time within which an action may be brought upon the policy of insurance by the beneficiary is not against public policy, and may be enforced, though less than the usual time imposed by law has been fixed. If this be so, it is difficult to see why a similar limitation upon the right of the insurer to contest should be against public policy, and why it should not be enforced by the courts. It is said, however, that fraud appearing in the origin of the contract must, as in any other case, render it null and void from the beginning. It is true that fraud vitiates all agreements and undertakings based upon it, and they must be set aside at the instance of the party defrauded. So, in this case, fraud in obtaining the policy would vitiate it at the option and upon the motion of the party defrauded; but, under the provision in question, the party must within the year exercise his right to repudiate and rescind it. The effect of this agreement not to contest is to put the company in the attitude of being unable to set up any fraud or false swearing in obtaining the policy, or any other defense to it, save the one excepted, so far as its original validity is concerned. Unless the language be thus construed, it is unpractical to put any reasonable interpretation on it. Unless it is the object and purpose of the provision to cut off all defenses arising out of the false statements of the applicant to obtain it, it is difficult to see what practical benefit the insured is to derive from it. . . . . Such a stipulation is neither unreasonable nor contrary to public policy. It is true there is in the policy a stipulation that a fraud shall vitiate it; but this is not inconsistent with the further requirement that the insurer must set up the fraud in the time limited."

Other authorities, both state and federal, bearing upon this point are Bates *v.* United Life Insurance Association, 68 Hun. 144; Teeter *v.* United Life & Accident Insurance Association, 11 Appellate Div. (N. Y.) 259; Vetter *v.* Massachusetts Mutual Life Association, 29 Appellate Div. (N. Y.) 74; Murray *v.* State Mutual Life Insurance Co., 22 R. I. 525; Franklin Insurance Co. *v.* Villeneuve, 25 Texas Civil Appeals 356; March *v.*

The Mutual Reserve, etc., Co., 62 Minn. 39; Austin *v.* Mutual Res. F. Ass'n, 132 Federal 555.

III. Policies Incontestable from Date.

Passing to a discussion of policies made incontestable from date, it is noted with regret that there has been some tendency among text-writers, which fortunately has not extended to the courts to any marked degree, to confuse this class of cases with those where the incontestable clause sets a limit of time within which the policy may be avoided.

The present case is essentially different from those just considered; while the question with a policy made incontestable after a specified time is whether such a limit may be legally set within which, if at all, even fraud may be relied on, the question now concerned is whether the right to defend on grounds of fraud may be absolutely contracted away.

There exists no more well settled principle of law than that fraud in the inception of a contract vitiates that contract. Evidently an agreement that, notwithstanding fraud may have existed in the procurement of a contract, yet it shall constitute no grounds of defense or avoidance, is directly contrary to this principle and should prove unavailing to the party intended to be benefited thereby. Both Bliss and Bunyon in their treatises on life insurance, recognize this principle, each having stated "an agreement that the insurer will not raise any objection, even in the case of direct personal fraud, is a void condition."

The clearest expression found in any text authority may be quoted with profit.

In Vance on Insurance, page 532, the author says:

> "Since it is a fundamental rule of law that fraud vitiates consent, it would seem to be almost axiomatic that an agreement made by the insurer not to contest the validity of the contract, if procured by actual fraud, could be rescinded by the insurer. If the fraudulently procured agreement not to contest can be rescinded, there would seem to be no reason why the insurer should be bound by such an agreement contained in a policy that was procured by fraud."

After thus clearly stating a true principle correctly, the author in failing to distinguish between policies incontestable from date

and those made so a stipulated time thereafter, falls into error common among text-writers. He says:

> "But, however clear this question may seem on principle, the majority of the courts before whom it has come for decision, in their jealous zeal to hold the insurer to the full measure of his liability as assumed, have held that the insurer, by the incontestable clause, has waived in advance his right to contest the validity of the policy on the ground of fraud in its procurement, as if such a previous waiver would not also be invalid when induced by fraud. While there is some authority for the view indicated here as preferable on principle, there can be little doubt that the doctrine that the incontestable clause precludes the defense of original fraud in procuring the contract will ultimately become a settled rule in the law of life insurance."

Unfortunately, we approach this question without light from our Virginia Court of Appeals, as the question of incontestability in life insurance policies seems never to have been before it.

A clear and forceful authority, admitting fraud as a defense despite the existence of the incontestable clause, is Reagan *v.* Union Mutual Life Insurance Co., 189 Mass. 555, 109 Am. St. Rep. 659, 2 L. R. A. (N. S.) 821.

In this case the court, after distinguishing those cases in which the policies provide for incontestability after the expiration of a specified time, and recognizing the validity of such provisions, even to the exclusion of fraud, says:

> "We must assume that the defendant issued the policy on the faith of the fraudulent representations, without discovering the fraud, or, so far as appears, having any opportunity to discover it before the contract was made. . . . . There is nothing to show that the policy was not issued immediately upon the receipt by the company of the report containing the false statement. The company was not bound to postpone the making of the contract. It has a right to enter into it, relying upon the report which was founded on the false representations.
>
> "We think the question intended to be presented by the report of the judge is the same as if the plaintiff's intestate had gone into the home office of the defendant, and had made material representations as inducements to the issuing of a policy, and the defendant's manager had said, 'I

will give you a policy, relying on your representations, I do not know whether they are true or false, but however false and fraudulent they may be, the company will never avail itself of the fraud as a defense to a suit upon the policy,' and had then given him a policy containing this clause. Will the court enforce the agreement never to set up fraud as a defense to a contract, when the contract is made in reliance upon material representations that may be true or false? This question has been considered in its application to contracts of insurance. In Wheelton *v.* Hardisty, 8 El. & Bl. 232, 283, Lord Campbell interpreted a provision that a contract should be indefensible as meaning indisputable, 'subject to the implied exception of personal fraud which will vitiate every contract.'"

Chief Justice Knowlton, in delivering this opinion, makes particular reference to the doctrine as laid down in Bliss, 2d Ed., § 254, where, quoting from Bunyon on Life Insurance, that author says:

"An agreement that the insurer will not raise any objection, even in the case of direct personal fraud, is a void condition. It has even been questioned whether it would not be sufficient to render the policy itself wholly void ab initio as an illegal contract. In these cases, then, fraud, if not mentioned, must be assumed to be excluded, since that construction is always to be preferred which will support a contract, and it is never to be supposed that the parties to it intend an illegal stipulation where a lawful meaning can be given to their words."

An instance case, forbidding companies to make contracts of life insurance against the policy of the law, is Ritter *v.* Mutual Life Insurance Co., 169 U. S. 139, where it was held, citing and approving the doctrine of Bunyon, that a contract to insure one against suicide would be against public policy. Mr. Justice Harlan, in delivering the opinion of the court, said:

"A contract, the tendency of which is to endanger the public interests or injuriously affect the public good, or which is subversive of sound morality, ought never to receive the sanction of a court of justice, or be made the foundation of its judgment."

In the Reagan case, supra, Chief Justice Knowlton, after citing the above quotation of Justice Harlan in the Ritter case, concludes:

"An agreement to be bound by a contract which the parties are making, in spite of subsequently discovered fraud by which it was obtained, would be subversive of sound morality. The plaintiff's contention that because by the terms of the policy the entire contract is contained in the policy and the application, the defendant is precluded from showing fraud practiced as an inducement to the making of the contract, is not well founded. This defense does not rest upon any provision of the contract, but upon the misconduct of the plaintiff whereby he obtained the contract. If we treat it (the incontestable clause) as intended to include fraud among matters which cannot be set up as a defense, and this is its more probable meaning, we are of opinion that this part of the provision is against the policy of our law, and therefore void."

This, the Reagan case, was decided in 1905, and, in closing its opinion, the court took occasion to remark:

"We have been referred to no decision which holds valid a provision that a policy of life insurance shall be incontestable for fraud from the day of its date. The only case we have discovered in which there is any language looking in that direction is Patterson, etc. *v.* The National, etc., Co., 100 Wisconsin 118, and in that the ground of defense, as we understand it, is that there was no evidence on which to raise the question."

The Robinson case and the Welch case, supra, are frequently cited in decisions and by text writers in support of the contention now under discussion. A careful analysis of these cases, however, will show that any reference to policies made incontestable from date is mere dictum. In the Robinson case (104 Ga. 256), the court says:

"If, however, the policy stipulated that it should be incontestable from date, and the insurer would not be allowed any defenses, whether originating in fraud or otherwise, or if it would appear from the terms of the contract that it was the intention of the parties that fraud should not be a defence, then such a contract would be void as being opposed to the policy of the law."

And further in the Welch case (108 Iowa 256), the Court says, in referring to a clause making the policy incontestable from date:

"In these cases then fraud, if not mentioned, must be as-

sumed to be excluded, since that construction is always to be preferred which would support a contract, and it is never to be supposed that the parties to it intend an illegal stipulation where a lawful meaning can be given to their words. Of course, this construction cannot make the policy really indisputable, for it leaves open the question whether the statement or omission complained of was fraudulent or not."

While considerable comfort may be found in the reasoning of these dicta, its weight can only be accepted as such, for in both cases the policies were made incontestable a specified time after delivery; the Robinson case three years, and the Welch case—the exact time is not stated in the opinion.

A valuable article on the general subject of *incontestability* in life insurance policies, may be found in 45 Central Law Journal 425. There the author, in referring to policies absolutely incontestable from date, says:

"On the face of the policy this seems a just and reasonable condition, since it might be urged that it is within the company's knowledge, and that the company must be perfectly well aware of the consequences of its own acts, and should, therefore, be held liable for any such clauses. But on examining the authorities on this point, it will be seen that the rule has often been declared that such a policy is void; that the underlying principle is that such a policy is void on the grounds of public policy, since fraud, which vitiates every contract, would be waived by any such policy. Such seems a reasonable rule, and the true principle."

After referring to the *dicta* of the Robinson and Welch cases, above quoted, and the reference to Bliss's statement as support for his contention, the author concludes:

"Some of the policies are to the effect that upon the delivery of a policy by the company, and acceptance by the insured, it will be incontestable. In speaking of such policies it must be noted that absolutely incontestable policies are, as already stated, void."

The foregoing constitute all the authority directly in point that has come within the writer's view. It may be pertinent, however, to consider two cases, everywhere cited, as in conflict with the Reagan case and the *dicta* in the Robinson and Welch cases.

The first in point of time and the leading of the two cases, referred to, is Patterson *v.* Natural Premium Mutual, etc., Co., 100 Wis. 118, 42 L. R. A. 253, 69 Am. St. Rep. 899, decided in 1898.

In this case the plaintiff had insured his life for the benefit of his children and later committed suicide. The policy was free from any provision excepting suicide as a part of the risk and contained a clause of absolute incontestability from date of issue.

Commenting on this fact, the court said:

> "Now, as before said, the Insurance Company has deliberately struck out the usual suicide clause from their policy and put in an absolute incontestable clause. Is it reasonable to say that they have in fact retained the suicide provision, artfully concealed under the form of words which not one person in a hundred would suspect meant to include it? We think not."

Bearing these facts in mind, and while citing and approving the Ritter case, 169 U. S. 139, the court held:

> "In a case where third persons are beneficiaries intentional suicide of the insured while sane does not avoid the policy in the absence of any provisions in the policy to that effect. . . . . In so holding it becomes unnecessary to consider the effect of the incontestable clause upon this branch of the case."

Attention is particularly directed to the court's reference to the incontestable clause, and further that it was SUICIDE and not FRAUD that was held insufficient as a defence.

On the particular question of fraud, the court further says:

> "It is further claimed by the defendant that the evidence tended to show a fraudulent scheme on the part of Patterson, when he took out his policy, to obtain insurance on his life for the purpose of thereafter committing suicide and defrauding the company for the benefit of his children. Doubtless that would be a good defence, if shown, unless it be cut off by the incontestable clause. It should be a defence not based on suicide alone but on the whole fraud of which the act of suicide was only the ultimate step. But the difficulty is that we have been unable to find any evidence which would justify the submission of that question to the jury."

Particular attention is drawn to the emphatic statement of the court referring to fraud, that "we have been unable to find any evidence which would justify the submission of that question (fraud) to the jury."

The Court does later say, in reference to fraud as a defense:

> "The incontestable clause would seem to effectually bar this defence. If this clause be not altogether a glittering generality, put in for no purpose except to induce men to insure, it would seem that it must cover such misstatements or omissions as here are alleged."

As the Court has in express terms distinguished the case from fraud, as stated above, this expression is purely dictum and no authority for that for which it has been frequently cited.

The only other case at variance with the Reagan case, and usually cited as affirming the Patterson case, supra, is Insurance Co. *v.* Fox, 106 Tenn. 347, 82 Am. St. Rep. 885. In this case, the court says:

> "The principal question presented to this court is whether under the terms and stipulations of the policy fraud perpetrated by the insured in procuring the policy is available as a defense to the recovery upon it.
>
> "It is further stated that if the clause should be so construed as to make the policy incontestable for fraud in obtaining it then the contract itself would be void because contrary to public morals and the sound public policy."

After referring to cases in which the policy is made incontestable after a specified time, which cases were admitted in argument of the principal case (Fox) to be correctly decided in excluding even fraud as a defense, the Court says:

> "It is conceded that this case (the Clements case) is correctly decided, but it is said that the present case, as well as the case from Iowa (the Welch case) is to be distinguished from it by the fact that in the Clements case a period of one year was reserved by the company in which it might make such investigations as it deemed proper, and if dissatisfied might cancel the policy, while here no time is reserved. It will be noted that this is a confession that fraud will not prove a defence after the expiration of one year; so that this confession, as well as the holding in the Clements case, goes to the extent that fraud in procuring

> the policy does not render it void but only voidable within the time specified. If the time may be limited to one year within which the defence of fraud may be made available, it is difficult to see why it might not be limited to six months or one month or such other time less than this as the company may deem it important to stipulate.
>
> "If fraud may be *waived* at all, certainly the parties may stipulate grounds upon which the *waiver* may be made, and if the company can stipulate that its policy shall be incontestable it may fix the conditions upon which incontestability may rest, and may fix the time limit upon the right to contest." (Italics ours.)

This case was decided in 1901, or before the Reagan case, which was disposed of in 1905. In the Reagan case, as quoted, the court states that it had been referred to no case upholding the incontestable clause to the exclusion of fraud, and further that its own search revealed no authority upon the point except the Patterson case, which it fully distinguished.

It would seem, therefore, that the Fox case, just considered, decided in 1901, was not before the Massachusetts Court in its conclusions on the Reagan case and it (the Fox case) stands out alone as authority for the doctrine holding the incontestable clause absolute against the Company.

Considering the Fox case further, the statement made by the court: "If fraud may be *waived* at all, certainly the parties may stipulate the grounds upon which the *waiver* may be made," is interesting in that it demonstrates the misconception under which the court seems to have labored throughout the opinion.

In cases where the policy is incontestable after a stipulated time from date, and all defenses, including fraud, are excluded. the courts have been careful to say that in refusing to admit the defense of fraud, it should not be understood that they were upholding and recognizing a party's right to *waive* such fraud.

The leading case, Wright *v.* Mutual Benefit Life Ins. Co., 118 N. Y. 237, in express terms, says:

> "It (the two year incontestable clause) is not a stipulation absolutely to waive all defences, and to condone fraud. On the contrary, it recognized fraud, and all other defences, but it provides ample time and opportunity within which they may be, but beyond which they may not be established.

> It is in the nature of, and served a similar purpose, as statutes of limitation and repose, the wisdom of which is apparent to all reasonable minds."

The whole reasoning of the Fox decision seems based upon the question of *waiver*. Because, says the court, "in those policies made incontestable, say, in two years, the insurer has *waived* the right to advance fraud as a defense, there is no good reason why, if the company can waive it after two years, it may not waive it from the very date of the policy." As the Court's premises seem wrong, it is submitted its conclusion must necessarily be so.

A rather different, though no less interesting, phase of the doctrine of public policy, invoked to defeat recovery on a contract of insurance conceived in fraud, arose in Bromley *v.* Insurance Company (Ky.), 5 L. R. A. (N. S.) 747. Here the insured for a pecuniary consideration contracted with a third person to obtain insurance upon his own life, making the policy payable to his estate, and immediately after its issuance assigned it as agreed. Lack of insurable interest was urged by the company as its defense to an action on the policy by the assignee, who promptly asserted the incontestable clause of his policy as excluding such a defense. At page 750, the court says:

> "It is also insisted for the plaintiff that as the policies contain a clause to the effect that they are incontestable after one year, the company cannot rely upon this defense. But the incontestable clause is no less a part of the contract than any other provision of it. If the contract is against public policy, the court will not lend its aid to its enforcement. . . . . The parties to an illegal contract cannot, by stipulating that it shall be incontestable, tie the hands of the court and compel it to enforce contracts which are illegal and void. If this were allowed, then the law might be evaded in all cases, and the aid of the court might be secured in aid of its infraction."

As heretofore pointed out, the inadmissibility of fraud as a defense in policies made incontestable after a specified time seems based entirely upon the theory of the statute of limitations, created by agreement *inter partes*. Statutes of limitation being favored in law usually exist in every State. Nearly every legal right must be asserted in proper time to have a standing in court. If not, it will be barred by operation of law.

The very rule that precludes the express or implied *waiver* of fraud by the parties (i. e., public policy) is effectively subserved by an agreement between the parties effecting a short statute of limitations. This is not contrary to public policy, and may truly be said rather in its interest, serving to avoid fraud. If one has a legal right, there is no hardship in requiring that it be asserted within some reasonable time, for it is very difficult to establish the rights and wrongs of a matter if the question is left until many years have passed; with lapse of time the witness and evidence, which are necessary to establish the real facts, may become difficult to obtain, so that the decision may, as a matter of legal necessity, go to the party whose evidence has been the more enduring, rather than to the one who really had the rights of the case, and who would have had at an earlier date evidence to establish those rights.

If the doctrine as laid down in the *Fox* case is sustainable, it may be interesting to know how the Court would have disposed of the situation where the person examined—purporting to be the applicant—is really someone else impersonating the applicant. That is, of course, fraud. According to the *Fox* case, however, fraud is not sufficient to render a policy contestable which contains a clause making it incontestable from date of issue. It is very evident that there is not only fraud here but something else, which goes to the very essence of the contract. The company in issuing the contract undoubtedly issued it with the intention of insuring the person who appeared before its medical examiner under a false name, and it was justified in regarding such person as the one whom it was insuring, whereas the person really named in the policy, and who claims to be the insured, is a different person. In other words, there has been no agreement as to the subject-matter; no meeting of the minds, and accordingly no contract, the parties not having had the same subject-matter in view. A clause under such a condition of affairs making the policy absolutely incontestable could hardly be invoked because no contract has been made.

Misrepresentation of one's physical condition, past or present, usually forms the basis of the insurance company's defense of fraud. Do not these states of facts just referred to bear a close anology, to the applicant, who through some physical disorder,

be the same functional or organic, has contrived to deceive the company's medical examiner and obtain a clean bill of health? Has not the diseased subject impersonated the healthy applicant as effectively to the company's deception as the imposter has done in the case cited?

Incontestable clauses of the character now under discussion are usually couched in the following, or similar, language:

"This *contract* is incontestable from date of issue."

The basis of a party's right to invoke a provision providing for incontestability must be a contract or other undertaking, of which such provision is a part. When, however, it is established that no legal liability flows out of the acts of the parties, whether such failure rests on either fraud of the impostor or the deception of the diseased applicant, it is difficult to follow the reasoning of the Fox case, pronouncing rights procured through fraud indisputable against the very deception that gave them form.

In N. Y. Life Ins. Co. *v.* Hardison, 199 Mass. 190, the following provision in the company's policy had been rejected by the Insurance Commissioner of the State of Massachusetts:

> "The policy shall be incontestable, except for non-payment of premiums, from its date."

In construing this clause the court, at page 195, says:

> "The provision that the policy shall be incontestable from date, contained in the petitioner's form of policy, is not the same as the provision that it 'shall be incontestable after two years from date, except, etc.,' required by sub-section 2 of Section 75 of the statute. Such a provision is not in accordance with public policy. Reagan *v.* Union Mutual Life Ins. Co., 189 Mass. 555."

The section of chapter 567 of Mass. Acts 1907, referred to by the court, is as follows:

> "All policies must contain a provision that the policy shall be incontestable after two years from its date of issue, except, etc."

This authority seems of peculiar interest here. The Massachusetts Legislature has in terms required all policies sold in that State to provide for incontestability after two years, thus

lending the weight of statutory enactment to the long line of cases previously cited sustaining the exclusion of fraud as a defense to policies made incontestable a specified time after date, and arraying itself against the reasoning of the Fox case.

The express holding of the Court that the provision proposed by the New York Life Ins. Co., making it incontestable from date, is void for reasons of public policy, in every way confirms the judicial interpretation of that clause in the Reagan case.

In conclusion it may be said generally that death, the risk in life insurance; the event upon which the insurance money is payable, is certain of occurrence; the uncertainty of the *time* of the occurrence is the material element and consideration of the contract. Can it be in the contemplation of the parties that the assured, by his own fraudulent representations as to his state of health, shall deprive the contract of its material element, shall vary and enlarge the risk and hasten the day of reckoning?

THOMAS BENJAMIN GAY,
Of the Richmond Bar.